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# A Critique of the Abortion Funding Decisions: On Private Rights in the Public Sector

By LESLIE FRIEDMAN GOLDSTEIN\*

In *Roe v. Wade*,<sup>1</sup> a 1973 decision, the United States Supreme Court declared that “a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under our Constitution”; that “only personal rights that can be deemed ‘fundamental’ . . . are included in this guarantee of personal privacy”; that “the right has some extension to activities relating to marriage; procreation; contraception; family relationships; and child rearing and education”; and that “[t]his right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>2</sup> Noting that even “fundamental” rights can be outweighed by “compelling governmental interests,” Justice Blackmun declared that the pregnant woman’s health needs by the fourth month of pregnancy justify health-related restrictions on abortion<sup>3</sup> and that the state’s interest in protecting “potential human life” is a sufficiently compelling interest to justify a ban on aborting a fetus unless the health or survival needs of the pregnant woman outweigh the state’s interest.<sup>4</sup>

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1. 410 U.S. 113 (1973).

2. *Id.* at 152-53 (citations omitted).

3. Unless such restrictions prohibit an accepted medical procedure which is “commonly used nationally by physicians after the first trimester and which is safer, with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth.” *Planned Parenthood v. Danforth*, 428 U.S. 52, 78 (1976) (the Court refers to saline amniocentesis).

4. 410 U.S. at 162-64. Justice Blackmun did not say that there is no legitimate public interest in the potential life represented by a pre-viable fetus; he stated only that the interest does not become compelling until the point of viability. Thus the criticism alleging that *Maher v. Roe*, 432 U.S. 464 (1977), clashes directly with *Roe* in recognizing a pre-viability

*Roe v. Wade* voided the abortion statutes of a least forty-six states<sup>5</sup> and created a political furor. Some state legislatures reacted by cutting off Medicaid funds for any abortions not deemed "medically necessary"; some municipalities forbade nontherapeutic abortions in municipally-funded hospitals; and in the much discussed "Hyde Amendment,"<sup>6</sup> Congress eliminated all nontherapeutic and most therapeutic abortions from the category of medical services to be paid for by Medicaid.<sup>7</sup> The Supreme Court upheld the first two of these responses in *Maher v. Roe*<sup>8</sup> and *Poelker v. Doe*,<sup>9</sup> and sustained the Hyde Amendment in June 1980, in *Harris v. McRae*.<sup>10</sup>

In *Harris v. McRae* the Supreme Court settled several questions. A five-justice majority<sup>11</sup> ruled that the reference to funding "medically necessary" services in Title XIX of the Social Security Act did not override the Hyde Amendment to the same act;<sup>12</sup> that the Hyde Amendment does not violate the establishment clause of the First Amendment;<sup>13</sup> and that the Hyde Amendment contravenes neither the explicit due process command of the Fifth Amendment nor the equal protection implication of that same amendment.<sup>14</sup> The Court's statutory argument, which focuses on

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interest is misplaced. See also Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191, 1196-97 (1978).

5. New York, Hawaii, Alaska and Washington had already legalized nontherapeutic abortions.

6. Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979) (restricting the use of appropriated funds to abortions where the mother's life would be endangered or where she had been raped). For similar restrictions in previous appropriation bills, see Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978) (The "Hyde Amendments" have always been attached to appropriation bills); Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977); Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976) (without the rape provision).

7. Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979). See also Pub. L. No. 96-86, § 118, 93 Stat. 662 (1979).

8. 432 U.S. 464 (1977).

9. 432 U.S. 519 (1977).

10. 100 S. Ct. 2671 (1980). See also *Williams v. Zbaraz*, 100 S. Ct. 2694 (1980). The latter case applied the reasoning of *Harris* to a state version of the Hyde Amendment; thus, it receives no separate discussion here.

11. Justice Stewart delivered the opinion of the Court in which Chief Justice Burger and Justices White, Powell and Rehnquist joined.

12. 100 S. Ct. at 2683-85.

13. *Id.* at 2689.

14. *Id.* at 2685-89, 2690-91. The Court also rejected, in a footnote, the contention that the Hyde Amendment was void for vagueness. *Id.* at 2685 n.17. None of the dissenters defended this contention, and their apparent agreement as to its insignificance appears warranted.

the logic of the legislative process of amending laws, is straightforward and non-problematic. Similarly, the establishment clause argument raises no novel issues; it rests on a solid line of "secular purpose" precedents.<sup>15</sup> The Court's due process and equal protection arguments, however, are troublesome.

The arguments in *Harris v. McRae* did not break new ground. After devoting two paragraphs to explaining that a legislative refusal to fund nontherapeutic abortions, upheld in *Maier v. Roe*, does not differ for constitutional purposes from a legislative refusal to fund "medically necessary" abortions, at issue in *McRae*,<sup>16</sup> Justice Stewart quoted or paraphrased Justice Powell's *Maier* opinion at every step of his argument.<sup>17</sup> As Justice Marshall noted in his dissent, "the Court treats this case as though it were controlled by *Maier*."<sup>18</sup> Thus, a careful analysis of the *McRae* decision requires an analysis of the *Maier* decision and its companion, *Poelker v. Doe*, which provide the basis for the Court's conclusions in *McRae*.

Even those who did not believe that *Roe v. Wade* was morally problematic<sup>19</sup> and were not concerned about its impact upon the balance of power between legislature and judiciary<sup>20</sup> may have reason to be troubled by the policy result imposed upon the American public by the *Roe-Maier-Poelker* trilogy and reinforced by *Harris v. McRae*. It is now the law that the choice of an abortion is a fundamental "constitutional" right; fundamental, that is, in the sense that no matter how intensely and profoundly legislative majorities deplore it, every woman with the means to finance an abortion must be permitted to obtain one, no matter how trivial or callous her reason for wanting it. It is also the law that a state may withhold from women in the poorest sector of the population—the women whose lives will be the most harshly burdened by additional children—the resources needed for exercising that right, whether the resources be the cost of medical services themselves or

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15. See, e.g., *Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 653 (1980).

16. 100 S. Ct. at 2687.

17. Stewart's *Harris* opinion quotes 47 lines of Powell's *Maier* opinion.

18. 100 S. Ct. at 2710 (Marshall, J., dissenting).

19. Aside from the most ardent right-to-lifers, a substantial sector of the American public is morally opposed to the legalization of second and third trimester abortions. Blake, *The Abortion Decisions: Judicial Review and Public Opinion*, in *ABORTION: NEW DIRECTIONS FOR POLICY STUDIES* 51-82 (E. Manier ed. 1977).

20. See, e.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973).

simply the use of facilities within a publicly funded hospital that has a maternity ward. As Justice Stevens points out in his dissent in *McRae*, these women might constitutionally be denied such resources even when an abortion is the only medical service that would save their lives.<sup>21</sup>

But even those who would welcome these policy results, because to them abortion is more of an evil than any of the harms it purports to avoid, have reason to be troubled by the implications of the arguments presented by Justice Powell to justify these results. As Justice Jackson said in *Korematsu v. United States*,<sup>22</sup> "[A] judicial construction of the due process clause<sup>23</sup> that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself."<sup>24</sup>

Those who applauded the new direction signaled by the Court in *Maher* and *Poelker* and pursued by it in *McRae*<sup>25</sup> might ponder the Court's insistence that the denial of funding for abortions "signals no retreat from *Roe*."<sup>26</sup> According to the Supreme Court, freedom of choice between abortion and childbirth is still as fundamental a right as it was in 1973; nevertheless, while a citizen has a right to choose, the government may encourage the selection of one choice over the other by structuring the pattern of available benefits. If the government refrains from imposing a penalty on one choice and, at the same time, does not distribute the benefits in a way that discriminates against the members of a suspect class, it may satisfy the requirements of equal protection by showing some rational relationship between its selective denial of benefits and a "constitutionally permissible" purpose.<sup>27</sup> In *Maher*, the state was

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21. 100 S. Ct. at 2714 (Stevens, J., dissenting).

22. 323 U.S. 214 (1944).

23. I would add, and the equal protection clause.

24. 323 U.S. at 245-46 (Jackson, J., dissenting).

25. See, e.g., Horan & Marzen, *The Moral Interest of the State in Abortion Funding: A Comment on Beal, Maher, and Poelker*, 22 St. Louis U.L.J. 566 (1979).

26. *Maher v. Roe*, 432 U.S. at 475. Justice Stewart quoted this "no retreat" language in *Harris*, 100 S. Ct. at 2687.

27. The traditional equal protection analysis is as follows: A classification in the area of general economic and social welfare legislation "will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). A court need only articulate a rational relationship to a legitimate state interest in order to uphold such a classification. On the other hand, a court must subject to strict scrutiny any law that sets up a suspect classification, *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), or that interferes with the exercise of a fundamental right; and the state must show a compelling government interest if such a law is to stand. *Id.* The tradi-

said to have an interest in "encouraging normal childbirth," or in "protecting the potential life of the fetus."<sup>28</sup> According to the majority argument, however, the protection of potential life has no special status; it is one permissible goal among many. Thus, a state, or Congress, is free to take an equally anti-life, and for that matter, anti-choice, position. A legislature may, for example, constitutionally declare that henceforth it will pay the full cost of abortions for all pregnant women who are eligible for Medicaid, but that Medicaid will no longer pay any cost related to childbirth. Since the plan would bear a rational relationship to the permissible goals of encouraging family planning and conserving public funds, it would be entirely constitutional under the logic of *Maier*, *Poelker* and *McRae*.

The anti-choice implications of these cases are not merely academic. Supreme Court decisions establish not only results, but general rules of law,<sup>29</sup> and the principles established in *Maier* and *Roe* extend to cases involving all fundamental rights, not just the right of privacy. If the Supreme Court intended what it implied in these cases, the extent to which government may manipulate our fundamental constitutional rights has now been dramatically increased. An analysis of those implications is offered in the hope

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tional indicia of suspectness are: whether "the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28. Although it could, and has, been argued that women and the poor fit that description, the Court has refused to grant them the higher level of review. *See, e.g.,* *Frontiero v. Richardson*, 411 U.S. 677 (1973) (sex classification; note particularly Justice Powell's concurring opinion); *James v. Valtierra*, 402 U.S. 137 (1971) (poverty classification). Classifications based on race have been recognized as suspect. *See, e.g.,* *Brown v. Board of Educ.*, 347 U.S. 483 (1954). A right is fundamental only if the Constitution implicitly or explicitly guarantees it. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973). Although the Court has recognized a constitutionally guaranteed freedom of personal choice in certain matters of marriage and family life, including the freedom to decide upon abortion, *Roe v. Wade*, 410 U.S. 113 (1973), in *Maier* and *Harris* it avoided the use of strict scrutiny by claiming that the exercise of the fundamental right in question had not been impeded—it had simply not been subsidized. Hence, only a rational basis was required in order to uphold the laws in question.

28. 432 U.S. at 471-78. *See also* *Harris v. McRae*, 100 S. Ct. 2685-89. There the Court, for reasons that are understandable in the context of medically needed abortions, dropped the discussion of "normal" childbirth and focused solely on the goal of protecting potential life. *Accord* 100 S. Ct. at 2713 n.3 (Stevens, J., dissenting); *id.* at 2706-07 (Marshall, J., dissenting).

29. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

that, once they are examined, their frightening qualities will convince the Court to retreat from the limb onto which it has ventured. To facilitate that retreat, I shall indicate the signposts in other precedents that point toward an alternative doctrinal path for defining the proper relationship between "negative" constitutional freedoms and governmentally conferred benefits.

### I. Justice Powell's Approach<sup>30</sup>

Justice Powell's approach in *Maher* has a certain surface attractiveness.<sup>31</sup> He argues first that the right recognized in *Roe* is purely a negative right; as one facet of "privacy" it is a right to be left alone, a right of an individual not be intruded upon by the government when faced with the intensely personal choice of whether to give birth or to seek an abortion. It is not a positive right in the sense that it imposes upon the government either a duty to coerce medical personnel into performing abortions or a duty to provide citizens with funds adequate to obtain abortions in the medical marketplace.

Since privacy of choice is only a negative right, the state's refusal to fund abortions does not impinge on the right at all, and therefore only the minimal rational basis test need be satisfied to justify any decision not to fund.<sup>32</sup> The state adds no burden to the decision to abort; it simply chooses to allocate its funds to alleviate other types of financial burdens.<sup>33</sup> "Indigency" rather than govern-

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30. Justices Stevens, Stewart, Rehnquist and White and Chief Justice Burger concurred with Justice Powell. Of this group, only Rehnquist and White dissented in *Roe v. Wade*, 410 U.S. at 171, 221, and *Doe v. Bolton*, 410 U.S. 179, 221, 223 (1973) (the original abortion decisions). Justice Stevens left the *Maher-Poelker* majority to dissent in *Harris*. His position is discussed below.

31. Indeed, it not only attracted five other Justices, but convinced a number of commentators that *Maher* and *Poelker* were legally correct. See Hardy, *Privacy and Public Funding: Maher v. Roe as the Interaction of Roe v. Wade and Dandridge v. Williams*, 18 ARIZ. L. REV. 903 (1976); Comment, *State Funding of Elective Abortion: The Supreme Court Defers to the Legislature*, 46 U. CIN. L. REV. 1003 (1977); Note, *Beal v. Doe, Maher v. Roe, and Non-Therapeutic Abortions: The State Does Not Have to Pay the Bill*, 9 LOY. CHI. L.J. 288 (1977).

32. See note 27 *supra*. One could argue that Powell neither needed nor articulated a rational basis for the decision not to fund abortions, although he did offer a rational basis for funding childbirth. For a discussion of discretionary legislative choices, see Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

33. *Maher v. Roe*, 432 U.S. at 471-74. Cf. *Doe v. Bolton*, 410 U.S. 179 (1973); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). See also *Buckley v. Valeo*, 424 U.S. 1, 94-95 (1976), cited by the majority in *Maher v. Roe*, 432 U.S. at 475 n.9.

ment is the devil that makes abortion hard to obtain for the poor—and the Constitution does not forbid indigency. Justice Stewart reiterated this argument in his *McRae* opinion.<sup>34</sup>

Justice Powell's analysis is superficially attractive because the people and the courts recognize degrees of government coercion and degrees of governmental intrusiveness into private lives. For example, there are important and constitutionally recognizable differences, based upon the degree of intrusion, between such conceivable modes of governmental regulation of procreation as: (1) forced breeding, such as that to which American slave women were subjected;<sup>35</sup> (2) use of governmental power to imprison and fine perpetrators of the distribution and use of contraceptives;<sup>36</sup> (3) exercise of governmental power to imprison and fine those who perform abortions;<sup>37</sup> (4) denial to the needy of government funds or the use of governmental facilities for abortions, and the provision of both for childbirth;<sup>38</sup> and (5) the provision of government funds for both childbirth and abortion for the needy, combined with a variety of financial rewards for childbirth, including cash payments for the poor, substantial tax credits for the wealthy, and elaborate free day-care nurseries for all. Each of these programs, arranged here in a scale of decreasing intrusiveness, would encourage childbirth. But Justice Powell and Justice Stewart would find only the latter two constitutionally permissible,<sup>39</sup> and Justice Brennan would probably find only the last permissible.<sup>40</sup> It is this recognition of differing degrees of coerciveness that underscores the neces-

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34. 100 S. Ct. at 2685-89.

35. F. DOUGLASS, *LIFE AND TIMES OF FREDERICK DOUGLASS* 123-24 (1962 reprint of 1892 ed.) (this coercion was not at government hands).

36. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

37. See, e.g., *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973). Interestingly, when abortion was a crime the women obtaining abortions were virtually never prosecuted.

38. *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977).

39. Although Justice Stewart dissented in *Griswold v. Connecticut*, 381 U.S. 479 (1965), which declared a constitutional right to use contraceptives, he announced in 1973 that he accepted *Griswold* as the law of the land, *Roe v. Wade*, 410 U.S. 113, 168 (Stewart, J., concurring). For Justice Powell's views on contraceptives and the Constitution, see *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (Powell, J., concurring).

40. This is conjecture, however, since in neither his *Maher* nor his *Harris* dissent did Justice Brennan fully articulate the grounds on which he would distinguish forbidden governmental discouragement of a protected activity and permitted encouragement of an alternative activity. For an attempt to fill out Brennan's argument see § II *infra*.



sity of line-drawing, and makes Justice Powell's approach seem attractive.

In addition, the Powell argument is appealing because his distinction between negative and positive rights is familiar and appeals to the common sense of the American reader. One may have a right to travel free from governmental interference, but that does not imply that one has a right to a bus ride at government expense.<sup>41</sup> Similarly, a right to attend private school does not entail a right to have the state pay one's tuition there.<sup>42</sup> Nor does freedom of the press imply a right to government-supplied printing presses. And the right of privacy which permits one to read pornography in one's home free of governmental sanctions<sup>43</sup> is very different from a right to receive a free supply of pornographic literature from the government.<sup>44</sup>

Appealing though the arguments are, they are deeply flawed. Supreme Court Justice Oliver Wendell Holmes, in two frequently quoted opinions that he handed down while on the Massachusetts Supreme Judicial Court, announced a doctrine that sounds similar to the one propounded in *Maher*, *Poelker* and *McRae*. Judge Holmes said of a policeman fired for constitutionally protected political activity: "The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman. . . . The servant cannot complain as he takes the employment on the terms which are offered to him."<sup>45</sup> Three years later Justice Holmes wrote, in a case involving a preacher arrested for speaking without a permit on the Boston Common, that:

For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more of an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. . . . [T]he legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take

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41. See *Maher v. Roe*, 432 U.S. at 474 n.8.

42. *Id.* at 475-77. Stewart used the identical example in *Harris v. McRae*, 100 S. Ct. at 2688-89.

43. See *Stanley v. Georgia*, 394 U.S. 557 (1969).

44. The latter two examples were not used by Powell, perhaps because he saw problems with them (see § I(B) *infra*). They come from the lower court dissent in *Doe v. Wohlgenuth*, 376 F. Supp. 173, 194 (W.D. Pa. 1974) (Weis, J., dissenting).

45. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 216-17, 29 N.E. 517, 517-18 (1892).

the less[er] step of limiting the public use to certain purposes.<sup>46</sup>

Holmes' logic and the logic of Powell and Stewart seem of a piece. Just as Holmes argued that the servant "takes the employment on the terms which are offered," Powell and Stewart argue that the citizen takes Medicaid on the terms which are offered. Just as Holmes argued that the legislature may close public parks, and thus may take the lesser step of limiting their uses, Powell argues that the city may close down its municipal hospital, so it may take the lesser step of limiting its use to non-abortion purposes.<sup>47</sup> The problem is that neither of these Holmes precedents is still good law. American jurisprudence has long since discredited the theory that since government may totally deny a benefit, it may also partially deny it, no matter how manipulative or unprincipled the distinctions made.<sup>48</sup>

Justice Powell attempts to distinguish his own *Maher* argument from this discredited approach by discussing three lines of precedents that might be thought to establish a rule that the state must fund abortions. He then attempts in *Maher* to distinguish abortion funding from each line. He also discusses a line of precedent that, in his opinion, legitimizes the particular pattern of spending that he upholds.

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46. *Commonwealth v. Davis*, 162 Mass. 510, 511, 39 N.E. 113, 113 (1895), *aff'd*, *Davis v. Massachusetts*, 167 U.S. 43 (1897). The statute under which the speech was prohibited gave the Mayor unfettered discretion to grant or deny speech permits.

47. See *Maher v. Roe*, 432 U.S. 464 (1977).

48. The *McAuliffe* approach was rejected in *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Board of Regents*, 391 U.S. 563 (1968); *Keyishian v. Board of Educ.*, 385 U.S. 589 (1967). See also *Spevack v. Klein*, 385 U.S. 511 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967). Of perhaps most immediate relevance is Justice Stewart's comment in *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), that the state may not, without a compelling need, deny public employment to "penalize the pregnant teacher for deciding to bear a child." *Id.* at 640. Significantly, Justice Powell expressed unhappiness with that approach, because he believed the government may choose to penalize childbirth or, presumably, efforts to avoid childbirth. He insisted that mandatory maternity leaves in the sixth month of pregnancy were simply irrational. *Id.* at 651. In *Harris v. McRae*, 100 S. Ct. at 2671, Justice Stewart either changed his opinion or did not see the conflict between his two positions.

The approach of *Commonwealth v. Davis*, 162 Mass. 510, 39 N.E. 113 (1895), *aff'd*, *Davis v. Massachusetts*, 167 U.S. 43 (1897), was rejected in a long line of cases beginning with *Hague v. CIO*, 307 U.S. 496 (1939). See Canby, *Government Funding, Abortions, and the Public Forum*, 1979 ARIZ. ST. L.J. 11; Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1; Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Stone, *Fora Americana, Speech in Public Places*, 1974 SUP. CT. REV. 233; Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117 (1975).

Justice Powell's discussion of the first line of precedents is useful for the hints that it provides concerning the limits of the rules the Court created in *Maher* and *Poelker*, but it leaves some important questions unanswered. His discussion of the next two groups of precedents is riddled with problems; it is this section of the *Maher* opinion that has been criticized by a number of commentators,<sup>49</sup> and by Justice Brennan in his dissents in *Maher*<sup>50</sup> and *McRae*.<sup>51</sup> Powell's discussion of the group of precedents that he believes supports his position received no attention at all from the dissenters,<sup>52</sup> and little from the critics.<sup>53</sup> Each strand of Powell's argument in *Maher* is examined below.

### A. No Monopolization by the State

Powell first examined in *Maher* the claim that indigent women, because of their poverty, have a constitutional right to government-funded abortions, just as they have a right to government-provided attorneys in criminal trials.<sup>54</sup> Powell distinguished abortion services cases from cases that had upheld an indigent's right to government aid to protect a fundamental right<sup>55</sup> on the

49. Perry, *supra* note 4; Susman, *Roe v. Wade and Doe v. Bolton Revised in 1976 and 1977—Reviewed?; Revived?; Revested?; Reversed? or Revoked?* 22 ST. LOUIS U.L.J. 581 (1978); Note, *State Funding of Nontherapeutic Abortions—Medicaid Plans—Equal Protection—Right to Choose an Abortion*, 11 AKRON L. REV. 345 (1977); Note, *A Right Without Access? Payment for Elective Abortions After Maher v. Roe*, 7 CAP. U.L. REV. 483 (1978); Note, *Medicaid Funding for Abortions: the Medicaid Statute and the Equal Protection Clause*, 6 HOFSTRA L. REV. 421 (1978); Note, *Abortion, Medicaid, and the Constitution*, 54 N.Y.U. L. REV. 120 (1979) [hereinafter referred to as *Abortion, Medicaid, and the Constitution*]; Note, *Constitutional Law—Abortion—No Requirement to Provide Medicaid Funds for Nontherapeutic Abortions Under Title XIX of the Social Security Act of 1965 or the Fourteenth Amendment*, 52 TUL. L. REV. 179 (1977); Note, *Indigent Women and Abortion: Limitation of the Right of Privacy in Maher v. Roe*, 13 TULSA L.J. 287 (1977).

50. 432 U.S. at 482 (Brennan, J., dissenting).

51. 100 S. Ct. at 2702 (Brennan, J., dissenting).

52. Justice Powell chided them for this, *Maher v. Roe*, 432 U.S. at 477 n.10. Justice Marshall made a passing reference to these cases in his dissent in *Beal v. Doe*, 432 U.S. 438, 461 n.6 (1977), which applies also to the *Maher* and *Poelker* decisions, but he certainly did not fully confront Powell's argument.

53. *Contra*, L. TRIBE, *THE CONSTITUTIONAL PROTECTION OF INDIVIDUAL RIGHTS: LIMITS ON GOVERNMENT AUTHORITY* 933 n.77, 931 n.68; *Abortion, Medicaid, and the Constitution*, *supra* note 49; Perry, *supra* note 4.

54. See 432 U.S. at 469 n.5, 471 n.6, 480 n.13; cf. *Beal v. Doe*, 432 U.S. 438, 454 (1977) (Marshall, J., dissenting); *id.* at 462 (Blackmun, J., dissenting). No one argued in these cases that all citizens have a constitutional right to government-funded abortions.

55. These rights included the right to a free divorce, *Boddie v. Connecticut*, 401 U.S. 371 (1971); a free attorney for the first appeal of a criminal conviction, *Douglas v. California*,

ground that "Connecticut has made no attempt to monopolize the means for terminating pregnancies through abortion."<sup>56</sup> This comment implies significant limits on the *Maher* and *Poelker* holdings.

If, for example, a state acting under the authority of *Poelker*, undertook not only to prohibit abortions in publicly-funded hospitals, but also to buy up all of the hospitals in the state in order to prohibit abortions altogether, thus indirectly restoring the ante-*Roe v. Wade* status quo, then the Court might respond as it did in *Planned Parenthood v. Danforth*.<sup>57</sup> In that case the Court struck down a regulation banning saline amniocentesis on the ground that it was a regulation "designed to inhibit, and [had] the effect of inhibiting [a] vast majority of abortions."<sup>58</sup> Or, if Connecticut, encouraged by *Maher* and *Poelker*, tried to hire all the obstetricians and gynecologists in the state in order to forbid them to perform abortions, Powell's qualification would again forbid such a policy. Powell upheld funding limits in *Maher* and *Poelker*, because, as he saw it, the states, though refraining from aiding abortion, were not placing obstacles in the path of women seeking abortions. The state left open avenues to abortions which were financed by other than public funding.<sup>59</sup> Thus, the Powell majority has not rejected the principle established in *Planned Parenthood*, that the state is forbidden to block, or to attempt to block, the exercise of a fundamental right.<sup>60</sup> Justice Stewart, a member of the *Maher* majority, reiterated the "places no obstacle" argument in his *McRae* opinion, apparently endorsing *Maher's* implications regarding the connection between state monopolization and government-created obstacles.<sup>61</sup>

A question that Powell did not confront in *Poelker* remains unanswered: How does one define the "community" in which a ser-

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372 U.S. 353 (1963); a free attorney for criminal charges, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (not listed by Powell); and the right to a free trial transcript for appealing a criminal conviction where the state allows such appeals and requires a transcript, *Griffin v. Illinois*, 351 U.S. 12 (1956). Powell did not list, though he might have, the right to a free ballot, *Harper v. Board of Elections*, 383 U.S. 663, 668 (1966). For a discussion of free access to be on the ballot, see notes 96-116 and accompanying text *infra*.

56. *Maher v. Roe*, 432 U.S. at 469 n.5.

57. 428 U.S. 52 (1976).

58. *Id.* at 79.

59. See *United States v. Kras*, 409 U.S. 434 (1973); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (per curiam) cited by Powell in *Maher v. Roe*, 432 U.S. at 469 n.5.

60. See also *Doe v. Bolton*, 410 U.S. 179, 193-95 (1973).

61. 100 S. Ct. at 2684-86.

vice must be monopolized in order to invoke the claim that the combination of the state's refusal to fund and the state's monopolization of the service raises constitutional problems? If a publicly-funded hospital were the only hospital in town, or in the county, or in a three-county radius, and if the state required that all second or third trimester abortions be performed only in licensed hospitals, has the state "monopolized" abortions for residents of those areas?<sup>62</sup> Or must the monopoly be statewide before it violates the mandate of *Planned Parenthood v. Danforth*? These questions must be answered in future decisions, but they hint at a potential limitation on the impact of the *Poelker* rule.

## B. No State-Imposed Obstacle Upon the Right

Having distinguished abortion from state-monopolized services, Powell next attempted to distinguish the refusal to pay for abortions from cases that have held that the government may not "unduly burden" the exercise of a constitutional right. As explained above, both Powell, in *Poelker*, and Stewart, in *McRae*, located the obstacle to abortion in the private fact of indigency. They insisted that the government decision to fund childbirth, or to provide hospital facilities for childbirth, in no way adds to the obstacles already facing the indigent pregnant woman desiring an abortion; the decision not to allow the use of government funds or facilities for abortions for the poor constitutes not the placing of an obstacle, but simply the refusal to remove an obstacle.

Justice Powell did not cite any case law in support of this distinction. In fact, at least as applied to *Poelker v. Doe*, the arguably relevant precedents seem to point in a very different direction.<sup>63</sup> *Poelker* involved a challenge to the constitutionality of an order by the mayor of St. Louis which prohibited abortions in the two city-owned hospitals unless needed to prevent death or grave physiological injury.<sup>64</sup> As recently as 1975, when Justice Powell and Justice Stewart concurred in *Southeastern Promotions, Ltd. v. Con-*

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62. See *Poelker v. Doe*, 432 U.S. at 524 (Brennan, J., dissenting) (per curiam).

63. Canby, *Government Funding, Abortions, and the Public Forum*, 1979 ARIZ. ST. L.J. 11, argues that the public forum precedents could also control *Maher v. Roe*, but I find that analogy more strained than the *Poelker* analogy. The argument in the text below is developed strictly with regard to *Poelker*.

64. In *Poelker*, the Court stated that "the constitutional question presented here is identical in principle with that presented by [*Maher v. Roe*]" and that "the reasons set forth in . . . that case" govern this situation. 432 U.S. at 521 (per curiam).

*rad*,<sup>65</sup> it was held that a municipality's refusal to allow in its public auditorium a production of "Hair" on the ground that the auditorium was dedicated to providing "clean and healthful"<sup>66</sup> entertainment amounted to an unconstitutional prior restraint on First Amendment rights of expression.<sup>67</sup> The Court stressed that the absence of a government monopoly on auditoriums in town was irrelevant, that the auditorium was ordinarily used for expressive activities, and that to restrict its use to only some constitutionally protected forms of expression<sup>68</sup> was to adopt a regulation with the same prohibitive effect as outright censorship.<sup>69</sup> Not all censorship is constitutionally forbidden, but the regulations governing the use of this public facility would have to meet the same strict standards as would outright censorship.

When a public facility is to be used for First Amendment expression, Justices Powell and Stewart, and court majorities since the 1930's,<sup>70</sup> have insisted that the government may not pick and choose which activities it will permit. A "rational basis" for such choices is not sufficient. Justice Powell himself applied this "public forum" doctrine in an opinion he authored in 1972. In *Healy v. James*<sup>71</sup> he rejected the claim of a state college that denying a local SDS chapter recognition as an official campus organization amounted to no more than a "refusal to place its stamp of approval" on it. He argued instead that such a denial, because it closed off to the group members the usual means of on-campus communication such as bulletin boards and meeting rooms, placed an impediment upon, and thereby burdened or abridged, protected First Amendment rights. The Court noted that while the college did not monopolize meeting rooms—they could for example, be rented off-campus—closing the state college's facilities to the SDS nonetheless abridged the group's associational freedom.<sup>72</sup>

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65. 420 U.S. 546 (1975).

66. *Id.* at 549 (quoting from respondent's brief).

67. *Id.* at 552.

68. There had been no finding that "Hair" was legally obscene which would have rendered it unprotected speech. See *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 54 (1973).

69. 420 U.S. at 552-56.

70. See, e.g., *Hague v. CIO*, 307 U.S. 496, 515 (1939); *Schneider v. State*, 308 U.S. 147, 163 (1939); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 155-56 (1946); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965).

71. 408 U.S. 169 (1972).

72. *Id.* at 181-83 (quoting from the district court's opinion).

The First Amendment, like the command that government shall not without a compelling interest intrude into matters so personal as the decision whether to bear or beget a child,<sup>73</sup> is a negative command. Yet the First Amendment imposes a positive duty on government to allow the use of streets and parks for speech, press, petition and assembly,<sup>74</sup> and to leave open for uses consistent with these First Amendment guarantees other government-owned facilities that are ordinarily used for speech and assembly purposes, unless there is a compelling governmental interest for refusing to do so.<sup>75</sup>

*Roe v. Wade* held that the Constitution implicitly forbids government interference, without a compelling state interest, in a woman's decision to terminate her pregnancy. To refuse the use of public facilities for performing abortions, where such facilities would ordinarily be used for exercising that freedom, would seem to violate directly the rule established in *Southeastern Promotions, Ltd.* and *Healy*. The availability of maternity services in a public hospital suggests that such a facility is ordinarily dedicated to the exercise of procreative freedom.<sup>76</sup> Thus, the majority in *Southeastern Promotions, Ltd.*, and Justice Powell's own opinion in *Healy* seem to contradict the argument Powell puts forth in *Maher*.

The *Maher-Poelker* majority offers no way to distinguish the logic of the public forum cases from *Poelker*. Had Powell employed his *Poelker* logic in the earlier cases, he could have labeled public meeting rooms or auditoriums government "subsidies" and thereby freed their use from stringent constitutional protection also. He offers no explanation for selecting different perspectives in these cases.

Two of the commentaries on *Poelker* suggest that Powell and Stewart may legitimately refute charges of being result-oriented on this point.<sup>77</sup> They suggest that *Poelker* is distinguished by the peculiarly private quality of the right at stake there,<sup>78</sup> or alterna-

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73. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

74. *Hague v. CIO*, 307 U.S. 496 (1939).

75. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Healy v. James*, 408 U.S. 169 (1972).

76. Which includes the freedom to choose abortion, *Roe v. Wade*, 410 U.S. 113 (1973).

77. Hardy, *supra* note 31; Horan & Marzen, *supra* note 25.

78. Hardy, *supra* note 31, at 920-22; Horan & Marzen, *supra* note 25, at 571-73.

tively, that the public forum cases may be distinguished by the peculiarly private quality of the right at stake.<sup>79</sup> One can claim that it would be odd or even contradictory to rule that the government must step in to assist an individual in exercising a right that is defined as a right to be left alone.<sup>80</sup> One can claim also that the right to speech, press, assembly and the vote<sup>81</sup> are peculiarly *public* rights, and thus government must assist in their exercise.<sup>82</sup>

These comfortable categories start to blur when one thinks of actual cases that have come before the Court. The right of political association, for example, is simultaneously a "public" right *and* a private right.<sup>83</sup> Moreover, if *Poelker* is premised on the notion that the government may refuse to allow the use of facilities that it owns for activities that it finds too controversial, then a real concern arises about the continuing validity of the right to privacy. Does *Poelker* signal a departure from the line of cases protecting the inviolability of the right to privacy where individuals engage in private, yet highly controversial conduct?<sup>84</sup> Does the *Poelker* argument regarding state-funded hospital care imply that persons so poor as to live in government housing "have" the right of privacy only in an abstract sense, but that if they want to exercise it they have to move somewhere else? The *Poelker* rationale raises these questions and, unfortunately, leaves them unanswered.

### C. No Penalty Or "Direct Burden" Imposed

After announcing that government refusals to aid are not the same as burdensome governmental acts, Justice Powell then analyzed two groups of cases that created rules mandating government aid under certain circumstances. He denied the applicability of these cases to abortion funding on the ground that one line of cases stands for the proposition that government may not penalize

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79. Hardy, *supra* note 31, at 919.

80. See Horan & Marzen, *supra* note 25, at 571-73 (Horan dubs it not just odd but "outrageous").

81. See discussion of the ballot cases, notes 103-23 and accompanying text *infra*.

82. See generally Hardy, *supra* note 24, at 919.

83. One could try making the argument, but it may be difficult to sustain the rationale that the right of political association is a less private right than that of privacy in the doctor-patient relationship. See *Shelton v. Tucker*, 364 U.S. 479 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

84. For example, the storage of pornography or the storage of contraceptives. See *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965).



a constitutionally protected choice, and that the government here imposes no penalty;<sup>85</sup> and on the ground that the second line of cases clearly distinguishes state imposition of a direct burden on constitutionally protected activity from mere legislative encouragement of an alternative activity.<sup>86</sup> These two arguments were endorsed in Justice Stewart's *McRae* opinion.<sup>87</sup>

Regarding the penalties argument, Justice Powell discussed *Shapiro v. Thompson*,<sup>88</sup> *Memorial Hospital v. Maricopa County*,<sup>89</sup> and *Sherbert v. Verner*.<sup>90</sup> Each of these decisions<sup>91</sup> invalidated statutes that denied welfare benefits subsequent to the exercise of a constitutional right. *Shapiro* and *Memorial Hospital* ruled that if a state provides welfare benefits to its own residents,<sup>92</sup> it cannot exclude from the category of recipients otherwise eligible residents simply because they have lived in the area for less than one year. Brennan, in *Shapiro*, and Marshall, in *Memorial Hospital*, reasoned that excluding recent migrants serves to penalize the exercise of the constitutional right to travel and therefore would be constitutional only if "shown to be necessary to promote a compelling government interest."<sup>93</sup> *Sherbert v. Verner*, authored by Jus-

85. *Maher v. Roe*, 432 U.S. at 474 n.8.

86. *Id.* at 475 n.9, 477 n.10.

87. 100 S. Ct. at 2687-89 (*id.* at 2688 n.19 exactly parallels *Maher v. Roe*, 432 U.S. at 474 n.8).

88. 394 U.S. 618 (1969).

89. 415 U.S. 250 (1974).

90. 374 U.S. 398 (1963).

91. Supplemented by a substantial body of related precedents, including *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956). See L. TRIBE, *supra* note 53, at 705-10, 1003-05, 1093-96; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960). The precedents for these decisions include a case involving the denial of public employment on the basis of an exercise of procreative freedom, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974). See also *Turner v. Department of Employment Security*, 423 U.S. 44 (1975).

92. In *Shapiro* these were Aid for Dependent Children [AFDC] benefits, and the holding also applied to congressional regulations for the District of Columbia, 394 U.S. at 622-23. In *Memorial Hospital* the benefits were county payments for non-emergency medical care, 415 U.S. at 252.

93. 394 U.S. at 634. *Accord*, 415 U.S. at 254-62. See also Hardy, *supra* note 31, at 919-20 (this penalty analysis combines the operation of the equal protection clause with that of the due process clause).

tice Brennan, dealt with an unemployment compensation statute that required a worker to be available for gainful employment Monday through Saturday in order to qualify for benefits. The eligibility requirement effectively penalized a Seventh Day Adventist for exercising her religious beliefs, and the Court held that this effect triggered strict scrutiny. Since the state's refusal to grant a special Sabbatarian exemption from the statutory requirement could not meet the compelling interest test, the exemption had to be granted.<sup>94</sup>

Powell argued that these cases are not analogous to *Maher v. Roe* because they involved withholding benefits from persons "who were otherwise entitled to the benefits" on the ground that those persons exercised a fundamental right.<sup>95</sup> He asserted that the refusal to fund the exercise of a right is distinguishable from the threat to withdraw a benefit if the right is exercised. He noted that the penalty argument might have prevailed if the state had denied "general welfare benefits to all women who had obtained abortions, and were otherwise entitled to the benefits."<sup>96</sup> Justice Stewart made the identical argument in *McRae*.<sup>97</sup> In other words, under the Constitution a state may not mandate, for example, a fifty dollar reduction in food stamp benefits during any month in which a woman obtains a Medicaid abortion,<sup>98</sup> but the state may deny the same woman the two hundred dollar benefit of a Medicaid abortion. The first action, to Powell and others of the *Maher* majority, is a penalty, but the second is not. Yet surely a woman so poor that she qualifies for Medicaid would find that a fifty dollar reduc-

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94. 374 U.S. 398 (1963). For a more recent example of a case requiring a religious exemption from a neutral statute, see *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

95. Justice Powell appears somewhat uneasy with the applicability of this analysis to *Sherbert*. He says tersely that his reasoning applies "similarly" to *Sherbert*, and that *Sherbert* was "decided in the significantly different context of a constitutionally imposed 'governmental obligation of neutrality' originating in the Establishment and Freedom of Religion Clauses of the First Amendment." *Maher v. Roe*, 432 U.S. at 474 n.8. It is hard to see the point of this disclaimer since the requirement imposed by the Court in *Sherbert*, that states give a special exemption only to religious objectors to Saturday labor, appears to clash directly with the neutrality required by the establishment clause. See 374 U.S. at 418-23 (Harlan, J., dissenting); W. BERNs, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 37-39 (1970).

The Court, in *Harris*, was apparently less uncomfortable with the *Sherbert* example, and elaborated its relevance at greater length. 100 S. Ct. at 2688 n.19.

96. *Maher v. Roe*, 432 U.S. at 474 n.8.

97. 100 S. Ct. at 2688 n.19.

98. Unless the state could demonstrate a compelling interest.

tion in food stamp benefits is less of a burden upon her right to freedom in the child-bearing decision than is the denial of a two hundred dollar Medicaid benefit.

Some clarification as to how Justice Powell reached his conclusions is offered in his statement that "*Shapiro and Maricopa County* did not hold that states would penalize the right to travel interstate by refusing to pay the busfares of indigent travelers."<sup>99</sup> But Powell's analogy between government-funded travel and government-funded abortion fails because the plaintiffs in *Maher* were not arguing for a general right to free abortions; they were arguing only that funding for childbirth and not abortion was an unconstitutional distribution of benefits. In their analysis the state establishment of Medicaid benefits for general maternity health-care costs would allow a pregnant woman seeking professional medical help in treating her pregnancy to be eligible for benefits *but for* her decision to exercise her constitutionally protected choice of abortion as the most appropriate treatment.

The *Maher* dissenters, Brennan, Marshall and Blackmun, defined the benefits in question as medical services needed to cope with the physical condition of pregnancy.<sup>100</sup> Hence, they agreed with the plaintiffs that persons who would otherwise be eligible are denied a government benefit solely because they choose to exercise a constitutionally protected right. On the other hand, Justice Stevens, joining in the majority opinion in *Maher*, believed the Court to have defined the benefit as medical services that are necessary in the sense that one's health is endangered by doing without them.<sup>101</sup> Thus, pregnant women, because they can safeguard their health with competent medical care during childbirth, cannot be said to have been denied the government benefit at all. Women seeking non-necessary abortions, which would by this definition fall outside the ambit of the government benefit, thus could not be viewed as being penalized for exercising this right. Under this analysis, a woman choosing an elective abortion is in no sense otherwise eligible for the benefit denied her.

However, the plaintiffs in *McRae* sought medically necessary

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99. *Maher v. Roe*, 432 U.S. at 474 n.8.

100. See *Beal v. Doe*, 432 U.S. 438, 449-50 (1977) (Brennan, J., dissenting).

101. See *Harris v. McRae*, 100 S. Ct. at 2712 (Stevens, J., dissenting) (a discussion of the *Maher* decision).

abortions.<sup>102</sup> They sought what amounted to medical treatment for a present medical need. Had the treatment sought been anything other than an abortion, the Medicaid patient would have been reimbursed for it—in other words, the patient was “otherwise eligible” to receive the benefits. The Court held, however, that the state was not obligated to fund medically necessary abortions. Thus, Justice Stevens, who had joined in the majority opinion and endorsed Powell’s argument in *Maher*, arrived at a conclusion opposite Powell’s in *McRae*. The reason for this result is that *Maher* failed to articulate its defining principle. Justice Stevens’ focus on the medical necessity for the abortion as defining the parameters of who was “otherwise entitled” to Medicaid benefits apparently was personally meaningful to him; *Maher* fails to suggest any rule by which other judges or legislatures could discern in advance of a Supreme Court decision how to define that category of benefits to which an excluded group would be “otherwise entitled.”

A second group of “penalty” or “burden” cases from which Powell attempted to distinguish *Maher* concerns state restrictions on access to the ballot. To support his contention that government funding which encourages one alternative to a constitutionally protected activity differs from a government policy which directly burdens that same protected conduct, Powell pointed to the difference between the campaign-financing decision, *Buckley v. Valeo*,<sup>103</sup> and a group of ballot access decisions that preceded *Buckley*.<sup>104</sup>

These [cases] were, of course, *direct burdens* not only on the candidate’s ability to run for office but also on the voter’s ability to voice preferences . . . . In contrast, the denial of public financing to some Presidential candidates is not restrictive of voters’ rights and less restrictive of candidates’. . . . [T]he inability, if any, of minority party candidates . . . will derive . . . from their inability to raise private contributions.<sup>105</sup>

The cases that deal with state restrictions on access to the ballot, such as *American Party of Texas v. White*,<sup>106</sup> do not fit quite so neatly into a “direct burden” slot as Powell implies. One could argue, for example, that the state aids the candidates whose names

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102. 100 S. Ct. at 2679-80.

103. 424 U.S. 1 (1976).

104. See *Maher v. Roe*, 432 U.S. at 475 n.9.

105. *Id.* (the *Maher* Court quotes *Buckley v. Valeo*, 424 U.S. at 94-95 adding the emphasis and omitting the footnote).

106. 415 U.S. 767 (1974).

it prints on the ballots it provides to voters. So long as the states do not prohibit write-in votes, thereby monopolizing the process, the state could be said to be imposing no burden on the candidates left off the ballot. It could be argued that the state merely aids their opponents. But the Supreme Court has declared that this analysis is without merit.<sup>107</sup> In *Lubin v. Panish*<sup>108</sup> the Court explained how this sort of "aid" to some candidates amounts to a "burden" on other candidates:

The realities of the electoral process . . . strongly suggest that "access" via write-in votes falls far short of access in terms of having the name of the candidate on the ballot. [A filing fee system] would allow an affluent candidate to put his name before the voters on the ballot . . . while the indigent . . . would be forced to rest his chances solely upon those voters who would remember his name and take the affirmative step of writing it on the ballot.<sup>109</sup>

The problem the Court identified in *Lubin* was not exactly a direct burden on someone's freedom to seek office; after all, if the indigent were able to raise private contributions the state's filing fee would not be a burden, but rather the price paid for having his name printed on the ballot. The Court indicated that some forms of state aid to some alternatives in effect burden other alternatives, and those burdens must meet strict constitutional standards.<sup>110</sup>

The Court drew the distinction in *Buckley* quoted by Powell, but it also presented a number of arguments that undermine the force of the quoted distinction. The Court noted that access to the ballot is more "necessary" for winning an election than is public financing,<sup>111</sup> and that the public financing system included a new expenditure ceiling that might allow minor parties to spend more money relative to what the major parties spent.<sup>112</sup> Finally, after noting "that public financing is generally less restrictive of access

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107. 415 U.S. at 772 n.3, 794-75. See also *Lubin v. Panish*, 415 U.S. 709, 719 (1974). But see *id.* (Blackmun & Rehnquist, J.J., concurring in part).

108. 415 U.S. 709 (1974). In *Lubin* the Court did not reach the constitutional question of whether the avenue of write-in votes was adequate to overcome the restrictions imposed by filing fees, but in *American Party of Texas* the Court held that a system of write-ins was not adequate compensation for absentee ballots that omitted from the ballot all names except those of the two major party candidates, 415 U.S. at 795.

109. 415 U.S. at 719 n.5.

110. See *id.* at 718.

111. 424 U.S. at 101-02.

112. *Id.* at 94, 99.

to the electoral process than the ballot-access regulations,"<sup>113</sup> the Court concluded: "In any event, Congress enacted [the Campaign Finance Act] in furtherance of sufficiently important governmental interests and has not unfairly or unnecessarily burdened the political opportunity of any political party."<sup>114</sup> This statement may not indicate the strictest scrutiny the Court has ever imposed, but it goes far beyond the minimal scrutiny that Justice Powell imposed on a government decision to fund childbirth but not abortion.<sup>115</sup>

Perhaps most important, though, in distinguishing *Buckley* from *Maher* is the qualifier with which the *Buckley* Court began its discussion of discrimination: "[I]t is important at the outset to note that the Act applies the same limitations on contributions to all candidates regardless of their present occupations, ideological views, or party affiliations."<sup>116</sup> In upholding the public financing section of the law the Court stressed Congress' ideologically neutral goals such as protecting public funds against frivolous claims of candidacy. Surely if Congress had attempted to fund only those parties with "good" or relatively noncontroversial<sup>117</sup> platforms it would have been faced with severe constitutional problems. It is inconceivable that Justice Powell would vote to uphold a public campaign finance law that explicitly limited government aid to those parties that endorse the Bill of Rights, thereby eliminating from eligibility, for example, Nazis and totalitarian Communists. Justice Powell's opinion in *Maher*, however, offers no clear principle by which to distinguish a government decision that would fund Democrats and Republicans but not Nazis and Communists, from a government decision to fund childbirth but not abortion.

Justice Stewart's *McRae* opinion did not discuss this group of cases, although it relied heavily upon Justice Powell's distinction between placing a direct burden on an activity and encouraging an alternative to that activity.<sup>118</sup> Justice Stewart merely adopted Justice Powell's phrasing, suggesting no solution for the problem dis-

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113. *Id.* at 95. Note that this wording concedes that public financing is somewhat restrictive of the electoral process.

114. *Id.* at 95-96.

115. *See Maher v. Roe*, 432 U.S. at 475-77.

116. 424 U.S. at 31.

117. *Cf. Maher v. Roe*, 432 U.S. at 479 ("The decision whether to expend state funds for nontherapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided.").

118. 100 S. Ct. at 2688.

cussed above.

Both the Brennan dissent, in which Justices Marshall and Blackmun joined,<sup>119</sup> and the Stevens dissent in *McRae*,<sup>120</sup> identified as a weakness in Justice Stewart's position precisely the difficulty noted above in Powell's *Maher* argument.<sup>121</sup> In *McRae*, Justice Stevens warned that the majority's reasoning would permit the denial of medical benefits to persons on the grounds that they are Republicans or Catholics or Orientals.<sup>122</sup> Justice Brennan raised the spectre of government-funded rides to the voting booth exclusively for members of one or another political party.<sup>123</sup>

#### D. Direct Precedents for *Maher v. Roe*

In *Maher*, Justice Powell drew attention to a group of cases that appear to have permitted a relationship between a constitutional right and government funding very similar to the one at issue here.<sup>124</sup> Those cases deal with the constitutional right to be free from government interference in the choice of schooling,<sup>125</sup> and government funding of public schools.<sup>126</sup> *Meyer v. Nebraska*<sup>127</sup> upheld the right of teachers to instruct children in foreign languages and the right of parents to hire them for that purpose; at the same time, it endorsed the right of the state to prescribe whatever curriculum it prefers in state-funded schools.<sup>128</sup> *Pierce v. Society of Sisters*<sup>129</sup> upheld the right of parents to send their children to private schools, again without implying that the state's power to fund public education was thereby limited. More recently, the Court in *Norwood v. Harrison*<sup>130</sup> rejected the argument

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119. *Id.* at 2705 n.6.

120. *Id.* at 2713 n.4, 2714-15.

121. The lack of a separate opinion by Stevens in *Maher* seems to indicate that he had not yet noticed the weakness in Powell's argument.

122. *Id.* at 2714-15.

123. *Id.* at 2705. For a discussion of the limits of Brennan's critique, see § II *infra*.

124. See 432 U.S. at 475-77. He relegates the other precedents discussed herein to footnotes. This is the only set of cases, other than the abortion rights cases themselves, that Powell discusses in the text of his opinion.

125. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

126. See, e.g., *Norwood v. Harrison*, 413 U.S. 455 (1973).

127. 262 U.S. 390 (1923).

128. *Id.* at 402.

129. 268 U.S. 510 (1925).

130. 413 U.S. 455 (1973).

that there is a "right of private or parochial schools to share with public schools in state largesse."<sup>131</sup> In *Maher*, Justice Powell chided the dissenters for ignoring these cases, in particular *Norwood v. Harrison*, which he calls a "much more analogous authority" than any of the precedents discussed in the dissents.<sup>132</sup> In *McRae*, the dissenters still had not formulated any rebuttal to the private school example. All four dissenters in *McRae* were silent regarding the *Pierce* and *Norwood* precedents.

The thrust of Justice Powell's argument, then, is that there exist some fundamental rights which are solely negative rights, and that the government may not prohibit them or place obstacles upon their free exercise. It may, however, refuse to assist persons who exercise these rights and may choose to actively encourage alternatives to them. The school cases exemplify one such negative right. The right to seek or to provide an abortion is another.

*Norwood* is not, however, entirely analogous to *Maher*. *Norwood* declared unconstitutional a program in which the state provided free books to a segregated private school. Although one has a right to attend private school, one has no constitutional right to attend, free of government interference, a segregated private school.<sup>133</sup> The state is constitutionally forbidden to aid segregated schools.<sup>134</sup> By contrast, a woman has a constitutional right to choose to terminate her pregnancy, and the government is not forbidden to assist her in that choice.<sup>135</sup> Justice Stewart's opinion in *McRae* abandoned the unwieldy *Norwood* approach and relied on the much less problematic *Pierce* rationale for making his point about private schools.<sup>136</sup> Just as parents have a right to send their children to private schools, so, too, do women have the right to decide to terminate their pregnancies. But just as the state has no

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131. *Id.* at 462, quoted by Powell, J., in *Maher v. Roe*, 432 U.S. at 477.

132. 432 U.S. at 477 n.10.

133. See *Runyon v. McCrary*, 427 U.S. 160 (1976). See also Goldstein, *Death and Transfiguration of the State Action Doctrine—Moose Lodge v. Irvis to Runyon v. McCrary*, 4 HASTINGS CONST. L.Q. 1 (1977).

134. This is what *Norwood* established. 413 U.S. at 462-68.

135. *Maher v. Roe*, 432 U.S. at 473-74. Thus, Justice Brennan, who focuses his analysis on whether government discourages the exercise of a constitutional right, would find *Norwood* a wholly inapposite precedent; the state may discourage attendance at segregated schools, but the citizen has no right to attend such schools.

136. 100 S. Ct. at 2689. Justice Stewart buttressed his private school argument with an additional example; he states that there is a right to use contraceptives but not to receive them at government expense.



obligation to fund or refrain from funding private schools, neither is it obligated to fund an indigent woman's abortion.

How far either Justice Powell or Justice Stewart wishes to extend his reasoning is unclear. Would either argue, for example, that the state may choose to fund some secular private schools but not others, funding only those that offer an anti-abortion curriculum?<sup>137</sup> Or would either argue that during a wave of anti-immigrant hysteria, a public school may bar the use of its classrooms for the study of foreign languages even by civic groups using them in the evenings?<sup>138</sup> Neither Justice Powell nor Justice Stewart offers any clear principle by which to distinguish the legitimate from the illegitimate application of the *Pierce* and *Norwood* precedents.

Justices Stevens<sup>139</sup> and Marshall,<sup>140</sup> each in a lone dissent in *McRae*, confronted the Court's lack of guiding principle by embracing the problem as its own solution; that is, each argued that the Court ought to balance competing interests and decide which are the constitutionally subordinate, rather than to apply empty formalistic rules that do not produce "equal justice."<sup>141</sup> Neither Justice Marshall nor Justice Stevens explained how the Court is to decide which constitutional interests are superior to others. The case-by-case balancing approach is not likely to offer any advantage over Powell and Stewart's affirmative/negative freedoms approach. In other words, Powell and Stewart, as well as Marshall and Stevens, believe that some selective government funding affecting constitutional rights is constitutionally acceptable and some is not; none of the four offers a means by which to determine which rights will receive preferential treatment.

## II. Justice Brennan's Approach

Justice Brennan<sup>142</sup> tried in *Maher* to supply what Powell ne-

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137. See *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Grosjean v. American Press*, 297 U.S. 233 (1936).

138. See § II(B) *supra*.

139. 100 S. Ct. at 2712-16 (Stevens, J., dissenting).

140. *Id.* at 2706 (Marshall, J., dissenting). Justice Marshall also concurred in the Brennan dissent. He dissented as well in the *Beal*, *Maher* and *Poelker* cases. See 432 U.S. at 438, 519, 526.

141. 100 S. Ct. at 2712 (Stevens, J., dissenting).

142. Some commentary follows Justice Brennan's basic approach. See notes 49 & 53 *supra*.

glected—a principle that would distinguish forbidden manipulations of public facilities and funds from permitted ones. Brennan suggested in *Maher* that government may not adopt a scheme that “grants and withholds financial benefits in a manner that discourages significantly the exercise of a fundamental constitutional right.”<sup>143</sup> His *McRae* dissent continued to advocate the adoption of this rule.<sup>144</sup>

The language in these dissents, like Brennan’s language in *Sherbert v. Verner*,<sup>145</sup> blurred the difference between a forbidden effect and a forbidden motivation.<sup>146</sup> Some of the commentary on *Maher* that supports Brennan’s basic conclusion refines it by focusing more narrowly on the matter of unconstitutional motivation.<sup>147</sup>

This refinement is useful because any genuine state effort to make childbirth less burdensome for the indigent—for example, by providing free day-care facilities—might in effect discourage abortions. Brennan does not seem to intend to forbid such measures, but his rule, focusing as it does only on effect, might have this result.<sup>148</sup>

Justice Powell avoided acknowledging that *Maher*’s funding scheme is motivated by a desire to discourage abortions. He claimed that the state is simply making “a value judgment favoring childbirth over abortion, and implement[ing] that judgment by the allocation of public funds.”<sup>149</sup> Childbirth is a very expensive proce-

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143. 432 U.S. at 488-89 (Brennan, J., dissenting).

144. 100 S. Ct. at 2702 (Brennan, J., dissenting).

145. 374 U.S. at 403-06. Note in particular the phrase in the middle of page 405, “whatever their purpose.” In *Harris* Justice Brennan continued this blurring. He referred to schemes that “incidentally or intentionally” burden protected choices. 100 S. Ct. at 2704 (Brennan, J., dissenting).

146. See A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 208-21 (1962); L. TRIBE, *supra* note 53, at 591-98; Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

147. See Perry, *supra* note 4; *Abortion, Medicaid, and the Constitution*, *supra* note 49. Tribe seems to argue for a forbidden effect doctrine and for a more narrow forbidden motivation doctrine. See L. TRIBE, *supra* note 53, at 931, 934-35.

148. But see note 127 and accompanying text *supra*, for a general discussion of Powell’s use of *Norwood*. In *Norwood*, measures discouraging a particular choice of school were not only permitted but required, yet Powell claims that *Norwood* is “much more analogous” than the other precedents.

149. 432 U.S. at 474.

cedure, much more expensive than abortion, and if the states wish to encourage indigent women to choose the more expensive procedure, one "rational" means of doing so is to pay for it. At no point in Justice Powell's opinion did he mention discouraging abortion. Rather, he spoke repeatedly of encouraging "an alternative activity,"<sup>150</sup> of encouraging "actions deemed to be in the public interest,"<sup>151</sup> of "encouraging childbirth."<sup>152</sup> Justice Stewart employed similar phrasing in *McRae*: "encourages alternative activity," "encouraging childbirth."<sup>153</sup> The closest Justice Stewart came to acknowledging that abortions are actively discouraged by the state was his statement that the government is favoring "childbirth over abortion" and that it is making "childbirth a more attractive alternative than abortion."<sup>154</sup>

Powell and Stewart apparently assumed that (1) when the state funds something, its decision requires in general only some rational relation to a valid governmental goal; (2) there is a rational basis for funding childbirth; and (3) the state need not provide a reason for a decision against funding, for it fails to fund an infinite number of things. Consequently, neither Justice Powell nor Justice Stewart provided any explanation at all for the state's choice not to fund abortions. Powell's only reference to the subject is a description of the controversy surrounding this "sensitive" topic "fraught with judgments of policy and value over which opinions are sharply divided."<sup>155</sup> Powell apparently sees the state as encouraging childbirth, a popular alternative, and as doing nothing about abortion, since it is so controversial. Similarly, Justice Stewart in *McRae* alluded to the "sensitive" nature of the policy choice involved and insisted that the question of federal subsidization "is a question for Congress to answer, not a matter of constitutional entitlement."<sup>156</sup> As for a congressional decision not to subsidize, abortion is intrinsically different from those other medical procedures that Congress chooses to subsidize, and to the Stewart majority that fact was sufficient to justify the congressional

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150. *Id.* at 475.

151. *Id.* at 476.

152. *Id.* at 478 (quoting *Beal v. Doe*, 432 U.S. 438, 446 (1977)).

153. 100 S. Ct. at 2687, 2692.

154. *Id.*

155. *Maher v. Roe*, 432 U.S. at 479.

156. 100 S. Ct. at 2689.

decision.<sup>157</sup>

Powell and Stewart's treatment of abortion funding, however, seems distorted. It is one thing to fund maternity services generally in order to alleviate financial pressures on pregnant indigents, or even partially to fund childbirth up to the point that the cost equals the cost of abortion; the latter method could be viewed as an attempt to enhance the freedom of a poor woman faced with the choice between abortion and childbirth by allowing her to choose in the absence of economic pressures.<sup>158</sup> It is quite another thing, however, to adopt a policy toward one group of persons who must make a choice between A and B, which says that the state will fund B but not A. This policy must be viewed as discouraging A and encouraging B.

A policy that merely makes childbirth more attractive would not necessarily share this flaw. State funding of childcare, for example, operates as an incentive not only upon pregnant women, but upon all potential parents; it encourages them to consider parenthood as an option by easing the economic burden of caring for the child. A policy of providing free medical care for childbirth and refusing to provide it for abortion, however, influences only pregnant persons. It rewards one choice and *ipso facto* penalizes the other, and all pregnant women must choose, confronted as they are with the fact of the developing fetus. That legislative decisions to fund childbirth and not abortions are motivated by a desire to discourage abortion is clear, then, from the nature of the case.<sup>159</sup> But even if it were not, any literate adult living in the United States since 1975 who has paid attention to politics knows that the exclusion of abortion services from Medicaid is motivated by opposition to abortion.

Does the concession that a particular government policy has the purpose and effect of discouraging the exercise of a constitutional right mean that the policy itself is unconstitutional? Justice Brennan and some of the commentators seem to think so,<sup>160</sup> but there are good arguments to the contrary.

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157. *Id.* at 2691-93.

158. Funding both childbirth and abortion would accomplish the same result, but there is strong political and perhaps moral opposition to funding abortion.

159. *Cf. Simson, Abortion, Poverty, and the Equal Protection of the Laws*, 13 GA. L. REV. 505, 513 n.44 (1979).

160. *See* note 49 *supra*.

Although there is no constitutional right to attend segregated schools, there is authority that suggests a constitutional right to maintain racially segregated private associations.<sup>161</sup> Still, most citizens probably would permit the government to discourage such private associations. Similarly, there is a constitutional right to run for office as a Nazi, but most would want the government to discourage Nazism. Neither Justice Brennan's nor Justice Powell's analysis offers a coherent doctrine for distinguishing cases where government may act to discourage certain constitutionally protected choices from cases where it may not.

### III. An Alternative Approach

The distinction between permissible and forbidden burdens placed by the government upon the exercise of constitutionally protected rights is difficult to formulate into a rule. The government clearly may not adopt a policy of financing all anti-Nazi candidates while excluding Nazi candidates, assuming that the Nazis stood for peaceful change through legal channels, so that they would enjoy First Amendment protection. Similarly, the government may not subsidize all anti-Nazi newspapers while excluding pro-Nazi newspapers.<sup>162</sup> Yet certainly the government may adopt and finance educational programs in public schools, in state universities, in government publications, and on public television that openly and vehemently discourage Nazism, or private racial segregation, or pornography. What distinguishes these policies constitutionally?<sup>163</sup>

The answer is not obvious, but one can offer tentative steps towards an answer.<sup>164</sup> A democracy's survival depends on some

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161. See note 133 *supra*.

162. Similar examples to this are used in *L. TRIBE*, *supra* note 53, at 933 n.77; Perry, *supra* note 4, at 1197.

163. Tribe suggests that the distinction is that government has a kind of First Amendment right of advocacy but that government may not "grant and withhold funds so as to favor those whose values coincide with its own." Tribe's distinction seems inadequate because government often disburses funds favorably to those whose values coincide with its own; for example, it gives tax breaks to people who donate to charities. See *L. TRIBE*, *supra* note 53, at 933-94.

164. Neither Brennan nor Powell in *Maher* even posed the question. Powell implicitly denied that any discouragement is taking place, 432 U.S. at 474, and Brennan argued that all discouragement of protected choices is banned unless the compelling state interest test can be met. 432 U.S. at 489 (Brennan, J., dissenting).

level of public commitment to a democratic form of government and to its underlying values,<sup>165</sup> and the government fosters that commitment through political socialization<sup>166</sup> or citizen education. Although our Constitution did create areas in which private choices are meant to be uncoerced by government, when government is acting in its role as educator, it may still discourage particular choices within these areas.

Contemporary government, however, acts in ways that are neither educational nor coercive, but somewhere in between. In the late twentieth century, for example, American government has become an overwhelmingly powerful force in the private sector as a purchaser and provider of goods and services. The question posed by *Maier, Harris and Poelker*, is whether government may use its influence as purchaser and provider of goods and services to influence citizens' choices within areas constitutionally protected from government coercion. The state may not pay people to join a certain political party, or to vote for certain candidates, because those choices, although they have public impact, are meant to be private, free choices. If a local police force paid \$100 bribes to obtain third party "consent" to search for evidence, the Court would have to see that such consent was not "free or voluntary" in the sense contemplated by our Constitution. Funding can pressure choices in ways that are less coercive than the threat of imprisonment, but a pressured choice is still not a free choice.

If government may not use its power as a provider of goods and services to influence constitutionally protected choices, what becomes, then, of the free day-care policy that was aimed at making childbirth an attractive alternative? If the decision whether to bear children was meant to be a free choice,<sup>167</sup> does this policy create forbidden pressure? The answer would be no, because the purpose of the policy was something other than encouraging people to have children. If government adopted a policy of pressuring people into having children, a compelling governmental interest would be

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165. I would hesitate to specify the level. There is an enormous political science literature debating this subject. For one of the classic studies see McCloskey, *Consensus and Ideology in American Politics*, 58 AM. POL. SCI. REV. 361-79 (1964).

166. On the relation between discouraging pornography and political socialization, see H. CLOR, *OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY* (1969); Berns, *Pornography vs. Democracy*, 22 PUB. INTEREST 3 (1971); Bickel, Kauffmann, McWilliams & Cohen, *Concurring and Dissenting Opinions*, 22 PUB. INTEREST 25 (1971).

167. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

required to justify that policy under the Constitution.

### Conclusion

*Roe v. Wade* held that the choice to have an abortion fell within the constitutionally protected area of free, private choice. That holding may have been in error, but the Supreme Court cannot simply act as though it did not exist. In *Maher*, *Poelker* and *McRae*, the Supreme Court has made new law affecting the status of constitutionally protected choices that implies a variety of threats to basic constitutional freedoms. Perhaps the Court will ignore what it has done, and let *Maher* and *Poelker* and *McRae*, rest as awkward anomalies in constitutional doctrine. But constitutional precedents usually extend beyond their immediate results, and for that reason a clarification is urgently needed.

This article has suggested two possible rules of clarification: (1) Government may not deny the use of a public facility for the exercise of a constitutional right when that facility is ordinarily dedicated to the exercise of that freedom and (2) Government, when not acting in its role as educator, may not use its power as a provider of goods and services to influence constitutionally protected choices.